More important, the question whether state or federal estoppel law applies was not preserved below, and thus the Court does not have jurisdiction to decide it. *See* Stern & Gressman, *Supreme Court Practice* 181 (8th ed. 2002) (citing *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945)). CIM's initial memorandum in support of its motion to compel arbitration did not mention equitable estoppel, much less argue about the applicable law; and its reply relegated mention of the federal circuit court cases on which it focuses so heavily now to a "see also" footnote. Def. Mot. Reply 1 n.1. The trial court's brief discussion of equitable estoppel relies almost exclusively on Illinois cases, Pet. App. 16a-17a, yet CIM's briefs on appeal did not argue that the court erred in doing so. Indeed, its opening brief again only mentioned the federal cases in a footnote, Def. Apl. Br. 14 n.6, and not until its reply brief on appeal did CIM even brief the equitable estoppel argument adopted in federal court cases such as *MS Dealer*. Def. Apl. Reply 4-6. Even then, although Ms. Peach's brief plainly assumed that Illinois law applied, Pltf. Apl. Br. 8-9, CIM did not address the choice of law issue. Instead, it argued that its theory was in line with both federal and Illinois law.

Not until a supplemental brief filed after oral argument to address a recent decision of the Illinois Supreme Court did CIM directly argue that federal estoppel law should apply. Def. Supp. Br. 3-4. However, under Illinois law, a question presented for the first time on appeal, which was not argued to the trial court, is not preserved for review. *Haudrich v. Howmedica, Inc.*, 662 N.E.2d 1248, 1253 (Ill. 1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). Not surprisingly then, the intermediate appellate court applied Illinois law, but did not address the choice of law question.

Accordingly, in this Court, the issue whether state or federal estoppel law should apply is not presented.

Moreover, in many cases, the choice of state or federal estoppel law will not alter the result. *See, e.g., Washington Mut. Fin. Group v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004) (applying federal law but noting that result would likely be same under Mississippi law). Indeed, regardless of whether state or federal estoppel law applies, the outcome should be the same here. As this Court has explained, "[a]n essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations." *Lyng v. Payne*, 476 U.S. 926, 935 (1986); *see Heckler v. Community Health Servs. of Crawford County*, 467 U.S. 51, 59 (1984). It was this "essential element" that the court below found, as a matter of fact, was lacking here. Pet. App. 10a; *see also supra* n.2. This factual matter is not worthy of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 04-1221

IN THE

Supreme Court of the United States

CIM INSURANCE CORPORATION,

Petitioner,

v.

ARMETTIA PEACH, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Peach cannot, and does not, dispute that the petition presents an issue of exceptional importance: whether a signatory to a contract with an arbitration clause can avoid its obligation to arbitrate by suing a non-signatory defendant under that very contract, and then arguing that the non-signatory is not entitled to invoke the arbitration clause. If Peach, and the court below, are correct, then arbitration clauses are not worth the paper on which they are written, because plaintiffs can always avoid such clauses by simply suing non-signatories. Not surprisingly, no fewer than seven federal courts of appeals have recognized that the Federal Arbitration Act ("FAA") does not allow that gimmick. As these courts recognize, by seeking to saddle a non-signatory with the *burdens* of a contract, a signatory is equitably estopped from seeking to deny the non-signatory the *benefits* of that contract, including the arbitration clause.

Peach argues, however, that there is no conflict because the court below applied state law equitable estoppel principles whereas the federal cases applied federal law equitable estoppel principles. But that argument only underscores the conflict, because both the federal and state cases are applying a single federal statute, the FAA, so the cases necessarily conflict on the underlying question whether equitable estoppel under the FAA is determined by reference to state or federal law. Peach's substantive objection to certiorari thus ultimately collapses into a procedural objection: that the underlying choice-of-law issue is not properly presented here. That objection is frivolous. The court below specifically held that the equitable estoppel analysis under the FAA is governed by state, not federal, law, and that holding is necessarily and obviously challenged by the question presented in the petition.

At bottom, Peach's opposition brief rests on the notion that it is no big deal for the FAA to mean one thing in federal court and another thing in state court. This Court, however, emphatically rejected that notion over twenty years ago, noting

that such disuniformity would "encourage and reward forum shopping" antithetical to the FAA. *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984). This case proves the point: Peach got her desired result by filing in state court in Madison County, Illinois, but would have obtained a very different result by filing in the local federal court, since the Seventh Circuit is among the courts on the other side of the conflict. *See Hughes Masonry Co. v. Greater Clark County Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981). This Court should not tolerate that situation, especially because Peach purports to sue not only on her own behalf, but on behalf of a nationwide class, thereby effectively evading the law not only of the Seventh Circuit but of the six other federal courts of appeals that have ruled likewise. Accordingly, this Court should grant the petition and resolve the conflict over a signatory's ability to evade its contractual obligation to arbitrate under the FAA by suing a non-signatory.

I. Peach's Substantive Objections Are Meritless.

Peach cannot, and does not, deny that no fewer than seven federal courts of appeals have held that a signatory to an arbitration agreement is equitably estopped under the FAA from opposing arbitration in the specific circumstances presented here—*i.e.*, where the signatory has sued a non-signatory under the very contract that contains an arbitration agreement. *See, e.g., JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 177-78 (2d Cir. 2004); *Astra Oil Co. v. Rover Navigation, Ltd.*, 344 F.3d 276, 279-81 (2d Cir. 2003); *Choctaw Generation Ltd. P'ship v. American Home Assurance Co.*, 271 F.3d 403, 406 (2d Cir. 2001); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001); *Long v. Silver*, 248 F.3d 309, 319-21 (4th Cir. 2001); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527-28 (5th Cir. 2000); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95-98 (2d Cir. 1999); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *Sunkist Soft*

Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 756-58 (11th Cir. 1993); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988); *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187-88 (9th Cir. 1986); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984); *Hughes*, 659 F.2d at 839.

Although the court below specifically acknowledged that its result conflicted with this line of federal cases, *see* Pet. App. 6-9a (citing, *inter alia*, *MS Dealer*, 177 F.3d at 947 and *Grigson*, 210 F.3d at 528), Peach nonetheless asserts that the result below is "fact-bound." Opp. 7. According to Peach, "the court below did not hold that, as a general matter, *a* non-signatory cannot compel arbitration on an equitable estoppel theory," but instead "held that, on the facts of the case, *this* non-signatory cannot compel arbitration on that theory." Opp. 1 (emphasis in original). That assertion is mystifying.

The court below denied CIM's motion to compel arbitration on the ground that CIM could not establish equitable estoppel under the FAA without showing that it "reasonably relied ... to its detriment [on a representation by Peach] that she would arbitrate any claim she had against CIM." Pet. App. 10a. That is, first and foremost, a *legal* determination that a non-signatory under these circumstances must show detrimental reliance. The seven federal courts of appeals cited above, in contrast, do not require such a showing *as a matter of law*. Rather, the courts in those cases recognize that equitable estoppel under the FAA categorically applies where, as here, a signatory seeks to hold a non-signatory liable under a contract with an arbitration clause. *See, e.g.*, *JLM Indus.*, 387 F.3d at 177-78; *Astra Oil*, 344 F.3d at 279-81; *Choctaw*, 271 F.3d at 406; *Dominium*, 248 F.3d at 728; *Long*, 248 F.3d at 319-21; *Grigson*, 210 F.3d at 527-28; *Smith/Enron*, 198 F.3d at 95-98; *MS Dealer*, 177 F.3d at 947; *Sunkist*, 10 F.3d at 756-58; *J.J. Ryan*, 863 F.2d at 321; *Letizia*, 802 F.2d at 1187-88; *McBro*, 741 F.2d at 344; *Hughes*,

659 F.2d at 839. There is nothing remotely "fact-bound" about the decision below that negates this legal conflict.

Nor can Peach negate the conflict by arguing that the court below applied state, rather than federal, law. At issue here is whether the trial court below properly denied CIM's motion to compel arbitration under the FAA, a federal statute. While it is certainly true that "[u]nder the Federal Arbitration Act, state-law contract principles generally govern the *enforceability* of arbitration clauses," Opp. 6 n.1 (citing *Doctor's Assocs., Inc. v. Casarotto*, 518 U.S. 681, 686-87 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)), the point here is that the ability of non-signatories to invoke (or resist) an arbitration agreement "presents no state law question of contract formation or validity," and thus is governed by "the 'federal substantive law of arbitrability,'" *International Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 417-18 & n.4 (4th Cir. 2000); *see also* Pet. 13-15 (citing, *inter alia*, *Washington Mut. Fin. Group v. Bailey*, 364 F.3d 260, 267 & n.6 (5th Cir. 2004); *Letizia*, 802 F.2d at 1187-88).

Thus, far from negating the conflict, the court below only underscored the conflict by relying on state-law principles of equitable estoppel to resolve CIM's motion to compel arbitration under the FAA. Indeed, Peach herself ultimately concedes—as she must—that the decision below "conflict[s]" with the federal appellate decisions noted above. Opp. 7. She argues, however, that the conflict is "shallow," because the decision below was rendered by an "intermediate-level state court," and not reviewed by the Illinois Supreme Court. *Id.*

As an initial matter, that argument ignores the fact that the court below is not the only state court to hold that a non-signatory's right to compel arbitration under the FAA is governed by state, not federal, law—as noted in the petition, the Supreme Court of Arkansas has held likewise. *See* Pet. 13 (citing *American Ins. Co. v. Cazort*, 871 S.W.2d 575, 579 (Ark. 1994) ("In determining whether nonsignatories should properly

be deemed parties to an arbitration contract pursuant to the Federal Arbitration Act, state law contract principles are invoked.")).

In any event, Peach's argument ignores the rule that where, as here, a State's highest court has denied discretionary review, the State's intermediate appellate court is "the highest court of a State in which a decision could be had," and hence unquestionably subject to this Court's review. 28 U.S.C. § 1257(a). That rule makes sense: state court application of federal law (and denial of federal rights) is not immunized from this Court's review whenever the State's highest court denies discretionary review. To the contrary, this Court often reviews decisions by intermediate state appellate courts where, as here, those decisions conflict with federal appellate decisions or otherwise present important questions of federal law. *See, e.g., Blakely v. Washington*, 124 S. Ct. 2531, 2536 (2004); *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 144 (2003); *Ewing v. California*, 538 U.S. 11, 20 (2003); *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 488-89 (2002); *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 417-18 (2001); *Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal.*, 528 U.S. 458, 463 (2000).

The conflict between the decision below and the federal appellate authorities noted above could not be more pronounced: CIM's motion to compel arbitration would have been successful in any of those federal circuits, but was unsuccessful in state court. It is simply not true, thus, that "regardless of whether state or federal estoppel law applies, the outcome should be the same here." Opp. 9. As noted above, the state court here required CIM to show detrimental reliance (which is all but impossible under these circumstances, since signatories are not in a contractual relationship with non-signatories in the first place), whereas the federal cases noted above impose no such requirement.

In addition, as noted in the petition, the court below relied heavily on the D.C. Circuit's conclusion that Section 4 of the FAA (which authorizes motions to compel arbitration) does not authorize a non-signatory to compel arbitration on equitable estoppel grounds. *See* Pet. 11-12; Pet. App. 8-9a (citing, and quoting extensively from, *DSMC Inc. v. Convera Corp.*, 349 F.3d 679, 683 (D.C. Cir. 2003)). Peach insists, however, that *DSMC* stands only for the proposition that a court "lack[s] *jurisdiction* under section 16 of the Federal Arbitration Act ... to consider an interlocutory appeal from denial of a motion by a non-signatory to compel arbitration on equitable estoppel grounds." Opp. 5 (emphasis added).

That argument is disingenuous at best. As explained in the petition, the D.C. Circuit's jurisdictional holding is based on its antecedent substantive conclusion that Section 4 of the FAA does not authorize a motion to compel arbitration by a non-signatory. According to the D.C. Circuit, "Section 4 ... applies only to an 'alleged failure ... to arbitrate *under a written agreement for arbitration*'—not an alleged failure to arbitrate when principles of equitable estoppel indicate that you should." 349 F.3d at 683 (quoting 9 U.S.C. § 4; emphasis added). Accordingly, *DSMC* most definitely stands for the proposition that non-signatories cannot compel arbitration under Section 4 of the FAA on equitable estoppel grounds—which explains why the court below relied so heavily on *DSMC*, *see* Pet. App. 7-9a, and why Peach herself cited that decision below for the proposition that "not all federal appellate circuits agree that the FAA provides a basis for allowing a non-signatory to enforce an arbitration agreement," Reply App. 5a; *see also id.* ("Recently, in *DSMC*, ... the Federal [*sic*] Circuit noted that the FAA governs arbitration agreements and the signatories to them; it does not govern the rights of a party who is not a signatory to an arbitration agreement but seeks to benefit from it anyway.").